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No. 08-68

In the Supreme Court of the United States

JENNY LEE HENRY, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's request for discretionary relief from removal.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 15

TABLE OF AUTHORITIES

Cases:

C-V-T-, In re, 22 I. & N. Dec. 7 (B.I.A. 1998) 3, 11
Henry v. *Ashcroft*, 175 F. Supp. 2d 688 (S.D.N.Y. 2001) 4
Higuit v. *Gonzales*, 433 F.3d 417 (4th Cir.), cert. denied, 126 S. Ct. 2973 (2006) 10
INS v. *Bagamasbad*, 429 U.S. 24 (1976) 2, 9
INS v. *Rios-Pineda*, 471 U.S. 444 (1985) 2
Klementanovsky v. *Gonzales*, 501 F.3d 788 (7th Cir. 2007) 13, 14
Mendez-Moralez, In re, 21 I. & N. Dec. 296 (B.I.A. 1996) 2, 9, 10, 11
Parodi, In re, 17 I. & N. Dec. 608 (B.I.A. 1980) 3
Po Shing Yeung v. *INS*, 76 F.3d 337 (11th Cir. 1995) 12
Po Shing Yeung, In re, 21 I. & N. Dec. 610 (B.I.A. 1996) 13
Sanchez, In re, 17 I. & N. Dec. 218 (B.I.A. 1980) 3
Xiao Ji Chen v. *United States Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006) 7, 10

Statutes and regulation: Page

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 1
§ 212(a), 8 U.S.C. 1182(a) 2
§ 212(a)(2)(A)(i)(I), 8 U.S.C. 1182(a)(2)(A)(i)(I) 2
§ 212(h), 8 U.S.C. 1182(h) ..... *passim*
§ 212(h)(1)(B), 8 U.S.C. 1182(h)(1)(B) 2
§ 212(h)(2), 8 U.S.C. 1182(h)(2) 2
§ 237(a)(2)(A)(i), 8 U.S.C. 1227(a)(2)(A)(i) 8
§ 237(a)(2)(A)(ii), 8 U.S.C. 1227(a)(2)(A)(ii) 4
§ 240A, 8 U.S.C. 1229b 3, 8
§ 240A(a), 8 U.S.C. 1229b(a) 3
§ 242(a)(2)(B)(i), 8 U.S.C. 1252(a)(2)(B)(i) 3, 7, 8
§ 242(a)(2)(C), 8 U.S.C. 1252(a)(2)(C) 8
§ 242(a)(2)(D), 8 U.S.C. 1252(a)(2)(D) 3, 8
§ 245, 8 U.S.C. 1255 3
8 C.F.R. 1245.1(f) 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the *Federal Reporter* but is reprinted in 264 Fed. Appx. 62. The opinions of the Board of Immigration Appeals (Pet. App. 18a-28a) and the immigration judge (Pet. App. 31a-74a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2008. A petition for rehearing was denied on May 23, 2008 (Pet. App. 13a-14a). The petition for a writ of certiorari was filed on July 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that several classes of

aliens are inadmissible to the United States. See INA § 212(a), 8 U.S.C. 1182(a). The Attorney General has discretion, under certain conditions, to waive the applicability of some of those grounds of inadmissibility, including (as relevant here) inadmissibility based on having committed multiple crimes involving moral turpitude. INA § 212(h), 8 U.S.C. 1182(h); see INA § 212(a)(2)(A)(i)(I), 8 U.S.C. 1182(a)(2)(A)(i)(I).

An alien is eligible to seek a Section 212(h) waiver only if she meets the statutory requirements. As relevant here, "in the case of an immigrant who is the * * * parent * * * or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence," an alien may show eligibility by demonstrating "that the alien's denial of admission would result in extreme hardship to * * * [her] parent * * * or daughter." INA § 212(h)(1)(B), 8 U.S.C. 1182(h)(1)(B); see also § 212(h)(2), 8 U.S.C. 1182(h)(2).

In addition to satisfying the statutory eligibility requirements, an applicant for a Section 212(h) waiver must establish that she warrants such relief as a matter of discretion. See, *e.g.*, *In re Mendez-Moralez*, 21 I. & N. Dec. 296, 299 (B.I.A. 1996) (en banc). An application for such a waiver, however, "may be denied in the exercise of discretion without express rulings on the question of statutory eligibility." *Id.* at 301 (citing, inter alia, *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985), and *INS* v. *Bagamasbad*, 429 U.S. 24, 25 (1976)).

By its terms, the Section 212(h) waiver applies to aliens charged in removal proceedings with being *inadmissible* to the United States. The Board of Immigration Appeals (BIA) has interpreted Section 212(h) as also applying to aliens who are charged with deportability, in two circumstances: if the basis for the charge

also made the alien inadmissible the last time she entered the country, see *In re Sanchez*, 17 I. & N. Dec. 218, 223 (B.I.A. 1980), or if the alien concurrently files an application for adjustment of status and thus puts herself in the same position as an alien presenting herself at the border seeking admission. See *In re Parodi*, 17 I. & N. Dec. 608, 611 (B.I.A. 1980); see also INA § 245, 8 U.S.C. 1255 (governing adjustment of status); 8 C.F.R. 1245.1(f).

b. Separately, the Attorney General also has discretion to cancel the removal of certain aliens who have been lawful permanent residents for five years and resided continuously in the United States for seven years. INA § 240A(a), 8 U.S.C. 1229b(a). As with Section 212(h) waivers, an applicant for cancellation of removal must establish not only that she meets the statutory criteria for eligibility but also that she warrants such relief as a matter of discretion. *E.g.*, *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998).

c. Since 1996, the INA has barred judicial review of the Attorney General's exercise of discretion in granting or denying waivers of inadmissibility under Section 212(h) and cancellation of removal under Section 240A. INA § 242(a)(2)(B)(i), 8 U.S.C. 1252(a)(2)(B)(i). In 2005, Congress qualified that jurisdictional bar by providing that it does not "preclud[e] review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section. INA § 242(a)(2)(D), 8 U.S.C. 1252(a)(2)(D).

2. Petitioner, a native and citizen of Guyana, was admitted to the United States as a lawful permanent resident. Pet. App. 32a. She has since been convicted of more than 30 crimes, including felony third-degree bur-

glary, disorderly conduct, endangering the welfare of a child, and more than 20 incidents of petit larceny. *Id.* at 20a, 33a, 40a-43a, 48a, 71a.

In June 2000, the former Immigration and Naturalization Service commenced removal proceedings and charged that petitioner was subject to removal on the basis of three of her convictions for petit larceny, which is a crime involving moral turpitude. Pet. App. 33a; see INA § 237(a)(2)(A)(ii), 8 U.S.C. 1227(a)(2)(A)(ii) (providing for removal based on conviction of two or more crimes involving moral turpitude). Petitioner, through counsel, conceded removability and applied for discretionary relief, including cancellation of removal and a Section 212(h) waiver. Pet. App. 34a, 36a. An immigration judge (IJ) found petitioner removable as charged. See *id.* at 34a. Although the IJ initially found petitioner ineligible for cancellation of removal, that eligibility determination was reversed on federal habeas review on grounds not relevant here, see *Henry* v. *Ashcroft*, 175 F. Supp. 2d 688 (S.D.N.Y. 2001), and her applications for discretionary relief proceeded before the IJ.

3. Following four hearings on the merits of her applications for cancellation of removal and a Section 212(h) waiver, the IJ denied discretionary relief and ordered petitioner removed to Guyana. Pet. App. 36a, 74a.

a. First, the IJ denied petitioner's request for cancellation of removal on the ground that petitioner failed to establish that a favorable exercise of discretion was warranted. Pet. App. 60a-61a, 65a-72a. He "balanced the adverse factors evidencing [petitioner's] undesirability as a permanent resident with the social and humane considerations presented" on her behalf and on behalf of her United States citizen relatives. *Id.* at 65a-67a.

The IJ found that petitioner had demonstrated considerable positive equities. Pet. App. 65a-67a. In particular, he performed a lengthy analysis of the "strong evidence that [petitioner] and her family, including her five minor U.S. citizen children and her mother, would suffer hardship" if petitioner were removed. *Id.* at 66a-67a. He considered that petitioner's children had never visited Guyana and would have far fewer opportunities and poorer access to medical care and benefits in that country (particularly petitioner's second daughter, who suffers from eczema and receives SSI benefits). The IJ concluded that "[t]here is no doubt that [petitioner]'s removal could cause severe emotional and economic hardship to [petitioner]'s family." *Id.* at 67a. He also considered her "strong family ties in the United States," including five minor United States citizen children, a United States citizen mother, a lawful permanent resident father, and five resident siblings, compared with almost no family ties in Guyana. *Id.* at 65a-66a.

Ultimately, however, the IJ determined that the adverse factors outweighed that positive evidence and warranted discretionary denial of petitioner's application. He considered the nature and underlying circumstances of petitioner's petit larceny offenses that served as the basis for her removal charge, her substantial criminal record, her insufficient efforts at rehabilitation, and other indicators of her bad character or undesirability as a permanent resident of this country. Those factors, he concluded, outweighed the social and humane considerations in favor of cancellation of removal. Pet. App. 67a-72a.

b. Second, the IJ denied petitioner's request for a Section 212(h) waiver. The IJ gave two grounds. He concluded that petitioner was ineligible for Section

212(h) relief because she was in deportation proceedings and had not been charged with inadmissibility, nor had she applied for adjustment of status in conjunction with her waiver request (which would have entitled her to be treated as eligible for Section 212(h) relief). Pet. App. 72a-73a; see pp. 2-3, *supra*. In the alternative, assuming arguendo that petitioner had established her eligibility for the waiver, the IJ found that petitioner had failed to establish that a favorable exercise of discretion was warranted, "for the reasons indicated" in his discretionary denial of her request for cancellation of removal. Pet. App. 73a.

4. The BIA affirmed the IJ's decision in part. Pet. App. 20a-28a.

a. The BIA determined that the IJ, when balancing the equities, had accorded appropriate weight to the evidence of hardship to petitioner and her family, to petitioner's extensive criminal activity and failure to rehabilitate, and to her lack of credibility. Pet. App. 20a-27a. On those grounds, the BIA agreed with the IJ's discretionary denial of petitioner's request for cancellation of removal. *Id.* at 27a.

b. The BIA did not reach the question whether petitioner was eligible for Section 212(h) relief. Pet. App. 28a. Rather, it affirmed the IJ's alternative discretionary denial of petitioner's request for such a waiver, for the same reasons that it agreed with the IJ's discretionary denial of cancellation of removal. *Ibid.* The BIA added that "[a]ny hardship that [petitioner's] family will face upon her removal to Guyana does not outweigh her substantial criminal history." *Ibid.*

5. The court of appeals dismissed a petition for review, in an unpublished summary order. Pet. App. 1a-7a. The court concluded that it lacked jurisdiction to

consider any of petitioner's claims of error. *Id.* at 6a. As relevant here, the court noted that petitioner argued that the BIA should have decided whether she was eligible for Section 212(h) relief by virtue of "extreme hardship" for her family, so that it could properly weigh hardship in the equitable balance in deciding whether to grant discretionary relief. *Id.* at 5a. But the court determined that "[t]he agency * * * [had] expressly considered the hardship her family would suffer." *Id.* at 5a-6a (citing, for example, *id.* at 66a). Therefore, the court concluded, petitioner's complaint was "that the agency did not give her hardship enough weight in balancing the equities." *Id.* at 6a. The court determined that it lacked jurisdiction to review such an exercise of discretion. *Ibid.* (citing INA § 242(a)(2)(B)(i), 8 U.S.C. 1252(a)(2)(B)(i), and *Xiao Ji Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 329 (2d Cir. 2006)).

The court of appeals reviewed only the BIA's decision, not the aspects of the IJ's ruling that the BIA had not adopted. Pet. App. 4a. Accordingly, the court, like the BIA, did not reach the issue of whether petitioner was eligible for a Section 212(h) waiver.

ARGUMENT

The court of appeals correctly held that it lacked jurisdiction to review the BIA's discretionary decision denying petitioner relief. Petitioner does not assert that that holding conflicts with any decision of this Court or of another court of appeals, and her fact-bound challenge to the jurisdictional holding lacks merit. Because the court of appeals correctly dismissed the appeal for lack of jurisdiction, it properly did not consider either of the questions presented by the petition for a writ of certiorari (see Pet. i). Nor did the BIA need to consider the

constitutional issue on which petitioner contends the courts of appeals are divided, because that issue pertains only to petitioner's *eligibility* for discretionary relief, and the BIA simply assumed that petitioner was eligible. Further review therefore is not warranted.

1. The court of appeals correctly concluded that it lacked jurisdiction because the INA does not provide for judicial review of the BIA's discretionary judgments to deny cancellation of removal or a waiver of inadmissibility under Section 212(h). Under the INA's express terms, "no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under" Section 212(h), 8 U.S.C. 1182(h), which provides for waivers of inadmissibility, or Section 240A, 8 U.S.C. 1229b, which governs cancellation of removal. INA § 242(a)(2)(B)(i), 8 U.S.C. 1252(a)(2)(B)(i). The court of appeals' straightforward application of that jurisdictional bar does not warrant further review.[1]

Petitioner contends that her claim falls within an exception to that bar. The courts of appeals retain jurisdiction to review "constitutional claims or questions of law" raised in a petition for review. INA § 242(a)(2)(D), 8 U.S.C. 1252(a)(2)(D). Petitioner maintains (Pet. 27-35) that the BIA's denial of a waiver of inadmissibility was legally erroneous and that her petition therefore presented a question of law. That contention lacks merit.

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[1] The government argued in the court of appeals that judicial review is also barred by Section 242(a)(2)(C) of the INA, 8 U.S.C. 1252(a)(2)(C), which precludes review of most removal orders against criminal aliens. Petitioner falls within that bar because she committed two or more crimes involving moral turpitude, each of which carried a possible penalty of one year of imprisonment. See *ibid.*; INA § 237(a)(2)(A)(i) and (ii), 8 U.S.C. 1227(a)(2)(A)(i) and (ii); see also Pet. App. 33a-34a (petitioner's concession of removability on this basis).

Petitioner's claim of legal error is based on the notion that the BIA's discretionary decision to deny relief did not give adequate consideration to the hardship she and her family would suffer as a result of her removal. Pet. App. 5a-6a. Both the IJ and the BIA extensively discussed the evidence of hardship petitioner's family would suffer if she were removed. *Id.* at 6a, 20a-21a, 28a, 65a-67a. And, as petitioner acknowledged in the court of appeals, see *id.* at 5a, 171a, the BIA was not required to make an express finding on the threshold question whether petitioner was eligible for a waiver because of "extreme hardship." Rather, it was entirely permissible for the agency to move directly to the discretionary weighing of the equities. *Bagamasbad*, 429 U.S. at 25.

Despite the immigration courts' express consideration of hardship, petitioner contends that the failure to make a factual finding that the hardship was "extreme" was legal error. In making that contention, petitioner relies on the BIA's decision in *In re Mendez-Moralez*, 21 I. & N. Dec. 296 (1996) (en banc) (Pet. App. 293a-332a), in which the BIA stated that "[e]xtreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered." *Id.* at 301. In petitioner's view, the IJ or the BIA *must* make the threshold eligibility determination of whether the alien has established the requisite extreme hardship that could in turn weigh as one favorable factor in the exercise of discretion. See Pet. 12-13, 27-29. That contention is refuted by *Mendez-Moralez* itself—the very BIA precedent on which petitioner relies—which expressly states (in the very next sentence) that "an application for discretionary relief, including a waiver under section 212(h), may be denied in the exercise of discre-

tion without express rulings on the question of statutory eligibility." 21 I. & N. Dec. at 301.

Moreover, the discretionary balancing that determines whether a waiver will be granted or denied properly considers *any* degree of hardship to petitioner or her family, including harm not necessarily covered in the eligibility finding of "extreme hardship" to the family members of an alien who are United States citizens or lawful permanent residents. "[Petitioner's] complaint, therefore, is that the agency did not give her hardship enough weight in balancing the equities," and the court of appeals correctly concluded that it lacked jurisdiction over that complaint. Pet. App. 6a.

Petitioner identifies no conflict in the courts of appeals on this jurisdictional issue, and none is apparent. To the contrary, the courts of appeals have broadly recognized that the jurisdictional bar to challenging the agency's discretionary weighing cannot be circumvented simply by asserting that the challenge is a "legal" one. See, *e.g.*, *Xiao Ji Chen*, 471 F.3d at 330-331 ("[A] petitioner's mere resort to the terms conventionally used in describing constitutional claims and questions of law will not overcome Congress's decision to deny jurisdiction over claims which in reality consist of nothing more than quarrels over the correctness of fact-finding and of discretionary decisions."); *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) ("We are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive."), cert. denied, 126 S. Ct. 2973 (2006).

2. Even if petitioner's challenge to the BIA's discretionary determination were considered a legal one, it

would plainly be foreclosed. Without any possibility that she could overturn the BIA's decision not to grant her a waiver, there still would have been no occasion to address the constitutional issue pertaining to *eligibility* for a waiver (to which she devotes most of her petition).

As discussed above, petitioner asserts that the BIA committed legal error by giving inadequate consideration to the hardship her family faces. Although she acknowledges that the BIA and the IJ considered that hardship, she contends that they erred by failing to label that hardship "extreme" before weighing it and by conducting similar analyses under the cancellation-of-removal and waiver-of-inadmissibility provisions. Those contentions lack merit. When balancing the equities under *either* provision, the BIA weighs the hardship to the alien *and* her family. See, *e.g.*, *C-V-T-*, 22 I. & N. Dec. at 11 (in making cancellation-of-removal decisions, "favorable considerations include * * * evidence of hardship to the respondent and his family if deportation occurs"); *Mendez-Moralez*, 21 I. & N. Dec. at 299-301 (same, in considering discretionary waiver of inadmissibility). Although "extreme hardship" to a family member is a prerequisite to obtaining a waiver of inadmissibility under Section 212(h),[2] there is no requirement that the BIA consider only hardships that it determines to be "extreme," nor would petitioning aliens want the BIA to be so restricted. See, *e.g.*, *id.* at 303 (considering both "extreme hardship" to alien's wife and children and

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[2] "Extreme hardship" is not a prerequisite to cancellation of removal, but as the cited decisions show, hardship is a favorable consideration in deciding whether to grant that relief, just as it is in deciding whether to grant a waiver of inadmissibility under Section 212(h). Petitioner's contention that the BIA erred by analyzing hardship considerations identically under the two provisions (Pet. 29) is meritless.

"[s]ome hardship" to alien himself). Thus, there is no requirement that the BIA denominate some or any harms as "extreme" before undertaking the weighing analysis.

And even if the BIA had considered whether the hardship to petitioner's family was "extreme" and determined that it was, the countervailing considerations would assuredly have caused the BIA to deny discretionary relief in any event. See Pet. App. 28a ("*Any* hardship that [petitioner's] family will face upon her removal to Guyana does not outweigh her substantial criminal history.") (emphasis added); see also *id.* at 21a, 26a-27a (noting petitioner's lack of rehabilitation and her lack of candor in the immigration proceedings as additional considerations weighing against discretionary relief).

3. Because the BIA has decided to deny petitioner the discretionary relief she seeks, and because that decision is unreviewable (and, in any event, legally unimpeachable), this case presents no occasion to consider petitioner's assertion that the Constitution requires that she be deemed eligible for that discretionary relief. The BIA assumed she was eligible just as she says she is. Pet. App. 27a. Because the BIA's decision constitutes the final, reviewable order on this issue, the court of appeals acted entirely appropriately in not taking up an irrelevant constitutional question. Further review on this question therefore is not warranted. Petitioner's assertion that she pressed her constitutional arguments below (Pet. 36) is beside the point: those arguments simply make no difference to the outcome of her case, in light of the fact-bound and entirely accurate reasons for dismissing her petition for review.

Moreover, even if the issue were properly presented, it would not warrant certiorari at this time. The case on which petitioner principally relies, *Po Shing Yeung* v.

INS, 76 F.3d 337 (11th Cir. 1995), does not hold that aliens in petitioner's situation *must* be treated as eligible for a discretionary waiver of inadmissibility under Section 212(h). The court of appeals acknowledged that Congress could permissibly limit Section 212(h) relief to aliens arriving at the border and could disqualify all aliens being deported from within the United States from seeking that relief. But, the court of appeals held, if the BIA permits some (but not all) aliens in deportation proceedings to apply for Section 212(h) relief, it must have a rational basis for whatever distinction it makes among aliens in deportation proceedings. The Eleventh Circuit thought such a rational basis was lacking in that case: the BIA would have permitted the alien to apply for Section 212(h) relief if he had departed and re-entered the country after committing the offense that was the subject of the waiver request, and the Eleventh Circuit thought there was no rational reason for that distinction. The court of appeals therefore remanded to the BIA to better harmonize its application of Section 212(h) to aliens in deportation proceedings. *Id.* at 341. It did not require that the alien be found eligible, however, and a subsequent statutory amendment conclusively established that he was not. *In re Po Shing Yeung*, 21 I. & N. Dec. 610, 611 (B.I.A. 1996) (en banc).

The Eleventh Circuit's outlier decision is not applicable here. As the Seventh Circuit has subsequently recognized, aliens have another means of qualifying for a Section 212(h) waiver while within the United States: they can apply for adjustment of status, which puts them in "the position of somebody seeking admission" and therefore eligible to seek a waiver of inadmissibility. *Klementanovsky* v. *Gonzales*, 501 F.3d 788, 794 (7th Cir. 2007). The Eleventh Circuit in *Po Shing Yeung* did not

consider how this other option might affect the rationality of Congress's decision to extend Section 212(h) eligibility to some (but not all) deportable aliens. Petitioner here did not apply for adjustment of status, Pet. 17, and the necessary visa may not have been available; thus, the immigration authorities never had the opportunity to consider her suggestion that this avenue was not in fact open to her, see Pet. 17-18.

Moreover, the Eleventh Circuit's decision gave inadequate consideration to Congress's valid interests in preserving a distinction between arriving aliens and aliens already admitted to the country. See *Klementanovsky*, 501 F.3d at 792-793 (finding *Po Shing Yeung* "unpersuasive," because "[w]e can think of plenty of rational reasons why Congress might have chosen to draw this line between criminal aliens who have left the country and those who have stayed"). Because *Po Shing Yeung* was decided in an interlocutory posture, was effectively mooted on remand by a subsequent statute, and has never been followed by the Eleventh Circuit or any other court of appeals, it would provide an inadequate basis for plenary review even if the issue were presented here. But that issue is not presented, and for that reason as well, it furnishes no basis for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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